In the Supreme Court

OF THE

United States

(27)

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OCTOBER TERM, 1943

No. 224

VERTEX INVESTMENT COMPANY
(a corporation),
Petitioner,

vs.

NORMA B. SCHWABACHER, individually, and NORMA B. SCHWABACHER and SAMUEL I. SCHWABACHER, as executors of the last will and testament of Louis A. Schwabacher, deceased; FIRST DOE, SECOND DOE, THIRD DOE, FOURTH DOE, FIFTH DOE and SIXTH DOE,
Defendants,

NORMA B. SCHWABACHER, individually, and NORMA B. SCHWABACHER, as executrix of the last will and testament of Louis A. Schwabacher, deceased,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the District Court of Appeal, State of California,
First Appellate District.

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To the Honorable Harlan Fiske Stone, Chief Justice, and to the Associate Justices of the Supreme Court of the United States:

The above named petitioner respectfully requests that a writ of certiorari issue to review the judgment of the District Court of Appeal of the State of California, First Appellate District, Division One, upon the grounds hereinafter set forth:

I. JURISDICTIONAL STATUTE.

The jurisdiction of this court is invoked under Section 237(b) of the Judicial Code, as amended (sec. 344 (b) U. S. C.), which provides in part:

> "It shall be competent for the Supreme Court, by certiorari, to require that there shall be certified to it for review and determination, with the same power and authority and with like effect as if brought up by writ of error, any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had * * * where any title, right, privilege, or immunity is specially set up or claimed by either party under the Constitution * * *."

II. OPINIONS BELOW.

The trial court and California Supreme Court filed no written opinion, but the opinion of the District Court of Appeal of the State of California, First Appellate District, Division One, review of whose judgment is here sought is reported in 57 A. C. A.

410 and in 134 Pac. (2d) 891. (R. 174-245.) In accordance with that opinion judgment was entered March 1, 1943, and became final May 1, 1943. (R. 248.)

III. SUMMARY OF MATTER INVOLVED.

On December 4, 1940, petitioner filed in the Superior Court of the State of California, in and for the City and County of San Francisco, its amended complaint setting forth facts entitling petitioner to relief from a court of equity for the wrongs committed against it. (R. 2-58.) Under appropriate local court rules respondent filed a demurrer to that complaint which was orally argued to the trial court on December 23, 1940, and briefed fully by written memoranda. (R. 124-126, 52-61.)

The trial court is divided into eighteen departments, each one of which is presided over by a different judge. One of such departments is the law and motion department, presided over at the time by Honorable Thomas M. Foley, whose duties required the hearing and disposition of matters such as respondent's demurrer to petitioner's amended complaint. (R. 124-125.)

On February 19, 1941, Judge Foley made his order overruling respondent's demurrer to petitioner's amended complaint and granting respondent ten days within which to answer the complaint. (R. 126.) Notice thereof was given to respondent's counsel (R. 126-127), who by letter to Judge Foley argued that the order overruling respondent's demurrer was er-

roneous. (R. 131-142.) Three several letters to such effect were written to the judge by respondent's counsel and answered by petitioner's counsel (R. 131-162), the last of such letters being dated March 14, 1941. (R. 159.)

Subsequently, and on March 31, 1941, Judge Foley was, by order of the presiding judge of the trial court, displaced in the law and motion department by Judge McWilliams, who, so far as pertinent here, at all times thereafter presided over such law and motion department. (R. 128-129.)

Then on April 10, 1941, Judge Foley made an order vacating his previous order overruling respondent's demurrer to petitioner's amended complaint, and sustained that demurrer, denying petitioner any leave to amend its complaint. (R. 162.) The following day Judge Foley signed and filed a judgment in the cause against petitioner and in favor of respondent, the result of which denied petitioner any and all relief. (R. 164-165, 62-63.)

Petitioner took an appeal from such judgment to the Supreme Court of the State of California (R. 64-65), which transferred the matter for hearing and decision to the District Court of Appeal of the State of California, First Appellate District, Division One. (R. 173.) That court rendered its opinion on March 1, 1943, affirming the judgment of the trial court, with one justice dissenting and filing a separate opinion. (R. 174-245.) A petition for a rehearing was filed by petitioner, but denied by the court on March 31, 1943, with the dissenting justice voting for a re-

hearing. (R. 246.) Thereafter a petition for a hearing by the California Supreme Court was filed and denied by that court on April 29, 1943, with two of the Supreme Court justices voting in favor of granting such petition. (R. 247.)

IV. QUESTION PRESENTED.

It is contended by petitioner that the trial court had no jurisdiction to change its ruling on respondent's demurrer to petitioner's complaint and enter judgment against petitioner without notice to petitioner that any such proceedings were pending or contemplated.

Concisely stated, the question may be put, as follows:

> Does not an ex parte order, made without notice to a litigant and depriving it of its cause of action, violate the due process clause of the Fourteenth Amendment to the Constitution of the United States?

Petitioner raised this question at the first opportunity in the presentation of its bill of exceptions on appeal from the void judgment of the trial court. (R. 163-166.) With respect thereto the majority opinion of the California District Court of Appeal states, petitioner being referred to as plaintiff (R. 177-179):

> "Plaintiff contends that even though the order sustaining the demurrer would have been proper had it been the original decision of the court, the

judge was without jurisdiction in the circumstances here to change his first ruling. The order overruling the demurrer was made on February 19, 1941. On March 3, 1941, counsel for defendant wrote a letter to the judge making a 'request that the previous order overruling our demurrer be vacated and the matter reopened for further consideration.' The letter called the court's attention to a decision in another state, which had appeared in the reports after the argument and filing of briefs in this case. Counsel urged that this decision was strong authority in defendant's favor. A copy of the letter was sent to plaintiff's counsel. On March 6, 1941, counsel for the plaintiff wrote a letter to the judge in answer to defendant's letter. Counsel for each side thereafter wrote two further letters to the judge, sending copies to opposing counsel. The last letter was written by plaintiff's counsel on March 14, 1941. On April 10, 1941, the judge made the order sustaining the demurrer without leave to amend and rendered judgment on the following day. No motion for reconsideration was made in open court and no formal notice of motion given.

Plaintiff contends that the court was without jurisdiction to change its ruling except pursuant to a motion made in court, and that it was required that notice of motion be given or waived. Plaintiff further contends that after the order overruling the demurrer had been made by the judge of the law and motion department, the case automatically passed to the jurisdiction of the presiding judge by force of the court rules, and the order changing the ruling on demurrer was beyond the jurisdiction of the judge of the law and motion department unless reassigned by the

presiding judge, which was not done here. It is further contended that since the judge who made the original ruling ceased to be the judge of the law and motion department on March 31, 1941, he was without right on April 10, 1941, to make the order sustaining the demurrer, such matters being within the sole jurisdiction of the law and motion judge.

We are of the view that the judge who originally ruled upon the demurrer had jurisdiction to change his decision by reason of the fact that it was he who originally ruled on the demurrer, even though at the time of the changed ruling he was no longer judge of the law and motion department. A ruling on demurrer, unlike many other types of judicial determinations, may be changed for no other reason than that the judge is of the view that his first ruling was erroneous. (*De La Beckwith v. Superior Court,* 146 Cal. 496; *Kelly v. Liddicoat,* 35 Cal.App.2d 559; *Howe v. Board of Supervisors,* 118 Cal.App. 306; 21 Cal.Jur. 124.) Proceedings had in court, pursuant to notice given or waived, when the demurrer was first argued are the basis for the changed ruling as for the original decision, and an additional motion and notice are not required."

V. REASONS RELIED ON FOR ALLOWANCE OF THE WRIT.

It is important to every litigant that he be advised of all action directly affecting his rights in a pending suit, and that he be not deprived of those rights without an opportunity to be heard. This is consistent

with the due process of law guaranteed by the Fourteenth Amendment to the Constitution of the United States. Elementary as this principle may seem, this court has never directly decided it.

In *Pennoyer v. Neff,* 95 U. S. 714, 24 L. Ed. 565, a counterpart of the problem was presented and ruled upon. There this court held that no rights *in personam* could be obtained by substituted service upon a non-resident, it being said (95 U. S. 733, 24 L. Ed. 572):

> "Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law."

No less, it follows that it is not consistent with due process of law to abuse jurisdiction once acquired by directly deciding a party's rights without notice to him.

As a matter of fact the California Supreme Court has held that lack of jurisdiction extends to a situation "where, though a court has jurisdiction over the subject matter and parties in the fundamental sense, it has no 'jurisdiction' (or power) * * * to act without the occurrence of certain procedural prerequisites." (*Abelleira v. District Court of Appeal,* 17 Cal. (2d) 280, 288, 109 Pac. (2d) 942.) Certainly, the summary dismissal of a party's cause of action

without giving him an opportunity to be heard is lack of jurisdiction within the California Supreme Court's definition, and inconsistent with due process of law.

It was said in *Coe v. Armour Fertilizer Co.,* 237 U. S. 413, 424, 59 L. Ed. 1027, 1032:

> "Nor can extra-official or casual notice, or a hearing granted as a matter of favor or discretion, be deemed a substantial substitute for the due process of law that the Constitution requires."

More recently it was said by Justice Brandeis in *Brinkerhoff etc. Sav. Co. v. Hill,* 281 U. S. 673, 682, 74 L. Ed. 1107, 1114:

> "* * * But while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right, which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it."

To the same effect is *Hansberry v. Lee,* 311 U. S. 32, 40, 85 L. Ed. 22, 26. The California Appellate Courts have repeatedly followed the same principle. (*Harth v. Ten Eyck,* 16 Cal. (2d) 829, 834, 108 Pac. (2d) 675; *Grinbaum v. Superior Court,* 192 Cal. 528, 540-541, 221 Pac. 635; *Younger v. Superior Court,* 136 Cal. 682, 69 Pac. 485.)

Despite the clear enunciation of the basic right, the California District Court of Appeal has ruled that petitioner's constitutional rights have not been impaired by an *ex parte* proceeding which denied petitioner the right to litigate its just claim. Petitioner was given no notice that its rights were to be affected, directly or indirectly; and the lower Appellate Court has held that no such notice is or was necessary. This could not be due process, no matter what the definition of the term.

Respondent may argue that the California Appellate Court upheld her technical legal defense and that petitioner, consequently, has no cause to complain. Sufficient answer to this may be found in *Coe v. Armour Fertilizer Co.*, 237 U. S. 413, 424, 59 L. Ed. 1027, 1032, where it is said:

> "* * * To one who protests against the taking of his property without due process of law, it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits."

So, also, in *Pennoyer v. Neff*, 95 U. S. 714, 728, 24 L. Ed. 565, 570-571, this court stated:

> "* * * the validity of every judgment depends upon the jurisdiction of the court before it is rendered, not upon what may occur subsequently."

VI. CONCLUSION.

Petitioner submits that the within petition presents a question which should be heard and decided by this court, and that, consequently, a writ of certiorari should issue as requested.

Dated, San Francisco, California,
July 21, 1943.

Respectfully submitted,
PHILIP S. EHRLICH,
Attorney for Petitioner.